

## **The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment<sup>1</sup>**

The Land Registration Act 2002 has been received with much critical acclaim, and rightly so. It is a work of monumental importance and monumental effort. Law Commission Report No. 271<sup>2</sup> was itself the last in a long series of Reports discussing, proposing, rejecting and recommending changes to the fundamentals of the land registration system established by the Land Registration Act 1925.<sup>3</sup> As is well known, the Act of 2002, which is now set for entry into force on October 13 2003,<sup>4</sup> is designed to revolutionise conveyancing in England and Wales and to bring the land registration system established by the 1925 Land Registration Act into the modern age.<sup>5</sup> Indeed, in terms of its underlying rationale, the Act of 2002 shares much with its 1925 counterpart. Both were born of the recognition that the systems they were designed to replace were (and are) no longer suitable for the social and economic conditions of the time. The 1925 Act is still seen by some as an interloper, polluting the purity of the historic principles of

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<sup>1</sup>. This paper was given in this long form at the WG Hart Symposium, University of London, 2002. A shorter version was published first in *The Conveyancer and Property Lawyer*, 2003.

<sup>2</sup>. *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (2001).

<sup>3</sup>. Two earlier Reports (Law Commission Reports No. 158 (1987) and 173 (1988)) were produced on the Commission's own initiative. Law Commission Report No. 235 (1995), leading to the Land Registration Act 1997, was the first written jointly with the Land Registry. The second joint Report, *Land Registration for the Twenty-First Century* (No. 254, 1998) formed the basis of much of the third joint report, No. 271, which contains final proposals and the draft of what is now the LRA 2002.

<sup>4</sup>. See the Land Registration Act 2002 website at <http://legislation.landreg.gov.uk>. The rationale for choosing this unusual date is unknown, but entry into force is dependant on the completion of relevant Land Registration Rules. A consultation paper and an initial set of draft rules have been produced, see <http://legislation.landreg.gov.uk/content/rules/default.asp>.

<sup>5</sup>. It is anticipated that fully functional electronic conveyancing will be rolled out on a voluntary basis in 2006/7, following a (hopefully) successful pilot in 2005, see Lord Chancellor's consultation document, *e-conveyancing, A Land Registration Consultation*, May 2002. See also Lord Chancellor's Department Consultation Paper: *A Draft Order under section 8 of the Electronic Communications Act 2000*, March 2001 and the *Consultation Response*, December 2001, regarding the formalities for the completion of electronic contracts.

ancient property law and the 2002 Act arouses suspicion and trepidation in similar measure for those who are now comfortable with the amended provisions of the 1925 legislation. Both reflect the new “technology” of their age (the introduction of the widespread use of registers and e-commerce respectively) and it was just as uncertain whether the system of the 1925 Act would work as it is now uncertain whether electronic conveyancing will actually deliver all the anticipated benefits.<sup>6</sup> Fundamentally, both Acts are directed principally to simplifying the *processes* by which land transactions are carried out and any substantive changes found in the two pieces of legislation can be regarded as ancillary to, and supportive of, this primary purpose. Lest we think this is too high a claim for the 2002 Act, Law Commission Report No. 271 makes it clear in its opening paragraph that “[t]he purpose of the Bill [sic.] is a bold and striking one. It is to create the necessary legal framework in which registered conveyancing can be conducted electronically”.<sup>7</sup> Of course, the Land Registration Act 1925 had partner legislation in the Law of Property Act 1925, the Settled Land Act 1925, the Trustee Act 1925 and the Administration of Estates Act 1925 and so itself is not so directly concerned with substantive matters. Thus, while the Act of 2002 is very clearly “transaction driven”, with all reform being bent deliberately and methodically towards the goal of e-conveyancing, it also indulges in wide ranging substantive law reform in support of this goal. There is, to use the words of the Law Commission, a very considerable “legal framework” put in place. As one would expect, this reform of the substantive law is well referenced to the primary goal of e-conveyancing and, for the most part, the reasons for the changes to the substantive law are persuasive *assuming* e-conveyancing is in place.<sup>8</sup> But, that system is not yet with us.

It is not the purpose of this analysis to challenge the assumption that all efforts must be bent towards establishing a system of e-conveyancing or to embark on a detailed

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<sup>6</sup>. There is robust criticism of the 1925 legislation in Report No. 271. However, there is no doubt that in essentials it has met its goals, albeit by means of inventive judicial application.

<sup>7</sup>. Report, op. cit. n.2 at para. 1.1.

<sup>8</sup>. The current author has reservations about the need for wholesale reform of the law of adverse possession as a *logical consequence* of e-conveyancing, see below text at n.83. Of course, they may well be other social and legal imperatives demanding such reform: see e.g. the remarks of Lord Browne-Wilkinson in *Pye Developments v Graham* [2002] 3 All ER 865.

assessment of those provisions of the Act directly concerned with that task.<sup>9</sup> Nor does the author underestimate the complexities of the legal, financial and administrative framework that must be put in place before the new system can come into operation.<sup>10</sup> However, while much attention is rightly given to the fundamental purpose of the 2002 Act, it is important to assess the considerable impact of the Act on those “everyday” principles of land registration that currently regulate over £2000 billion worth of property.<sup>11</sup> As has been said already, many – perhaps most<sup>12</sup> – of these consequential substantive changes<sup>13</sup> are designed to facilitate and encourage the new conveyancing processes and to make a reality of the desire to move from registration of title to title by registration where it “will be the fact of registration and registration alone that confers title”.<sup>14</sup> Yet, given that these substantive changes are certain to come into force before the e-conveyancing provisions, even though they are to a large extent parasitic on those provisions, what will be their impact in an e-conveyancing-free climate? More importantly, is there a possibility that the substantive law reforms will produce unwelcome or unexpected effects because they are not located in an e-conveyancing system? Is it possible that the effect of the substantive reforms will be different before and after the introduction of e-conveyancing and, most of all, is there an opportunity for

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<sup>9</sup>. In fact, apart from a heavy emphasis on the policy reasons driving the change, Report No. 271 and hence the Act itself says relatively little about the mechanics of e-conveyancing. Nor should we be surprised, for the devil will be in the detail and will be provided by the relevant Land Registration Rules after extensive consultation. See generally D. Capps, *Conveyancing in the Twenty-first Century: An Outline of Electronic Conveyancing and Electronic Signatures*, [2002] Conv. 443.

<sup>10</sup>. The May 2002 consultation document on e-conveyancing conveys this admirably, noting that it will be the first in a series of consultation exercises. Not least, it is now clear that the new Land Registration Rules will come in two stages. The standard rules (my description) which are now in consultation and the e-conveyancing rules at a latter date.

<sup>11</sup>. Chief Land Registrar's estimate of the value of titles guaranteed under the 1925 legislation as at May 2002, see above n.4.

<sup>12</sup>. The Report, op cit. n.2 at para. 1.6 argues that “virtually all the changes that the Bill [sic] makes to the present law flow directly from it”.

<sup>13</sup>. “Consequential” in the sense that they are not central provisions concerning e-conveyancing. Of course, they are not inconsequential in terms of their effect on the law of land registration.

<sup>14</sup>. Report op cit. n.2 para. 1.10.

the courts to exploit any uncertainties in the legislation to undo or undermine the system of e-conveyancing before it becomes operative?

In order to address these questions, this essay examines a number of the “parasitic” changes to substantive law, both in their relation to the central goal of e-conveyancing and in their own right as amendments to the law of land registration. Of course, it must be accepted at the outset that these changes were not *designed* to stand alone, even if they could in fact be justified without the conveyancing imperative, and thus any adverse comment on the relevant provisions of the Act is itself open to criticism. However, it bears repetition that many of the changes actually will stand-alone for a period of time – perhaps a considerable period of time - and they will come into effect without the protective cloak of e-conveyancing. They will change the face of land of registered title before the first byte of e-conveyancing.

***A: The transformation of overriding interests into interests that override.***

There is, perhaps, no other creation of the Land Registration Act 1925 that has aroused as much fierce comment as the infamous section 70(1) and its list of overriding interests. The very fact that there is a category of property right that can bind a purchaser of a registered title without either that interest appearing on the register or *necessarily* being discoverable is thought by many to be an anathema to the very idea of a registration system. After all, why have a system of title registration if the registered entry is not conclusive as to important adverse interests? To others, among which the present author can be counted, there is nothing *inherently* wrong with a category of non-registrable binding right, even in a system of land registration. After all, pre-1926 property law coped with the concept of legal rights *ipso facto* binding transferees and there was no certainty that all such rights were discoverable by inspection of the title documents or the land itself. Again, although the analogy is not perfect, a person would not usually buy a car by sight only of the registration document, so we might think that a prudent purchaser might wish to inspect the property (and hence discover much about it) irrespective of the

state of the register.<sup>15</sup> So also, policy might dictate that there *should* be a class of right that binds a registered title despite the fact of its non-registration. Obligations of general public utility, such as the burden of maintaining sea walls and public rights of way, are an obvious example. But, “policy” can mean more than this and it *could* be thought socially and economically politic to ensure that the property rights of those who do not have the protection of a formal acknowledgement of their rights, but who nevertheless occupy land as their home, should be protected without the need to register.<sup>16</sup> For, theory aside, the act of registration “against” another’s land, especially the land of one’s emotional partner (as would be required without the protective cloak of s.70(1)(g) LRA 1925), is readily seen as an hostile act. It seems to scream “I don’t trust you!”

Of course, we no longer live in 1925 and legislation drafted in the early part of the last century is unlikely to be suited to the needs of the early part of the present one. More importantly, it is unarguable that changes in the substance of land law and in the way in which land is now used have turned section 70(1) LRA 1925 into a different creature from that envisaged by the drafters of 1925 Act. The development of principles permitting (some might say encouraging) the informal acquisition of interests in land – such as resulting and constructive trusts and proprietary estoppel – have dramatically increased both the chance that an adverse right might exist and that it might be undiscoverable, being neither materially recorded nor necessarily obvious to our prudent purchaser. Likewise, the rise to prominence of a different kind of “purchaser”, the institutional mortgagee, and the importance of such lending to the domestic economy<sup>17</sup> has both exposed the latent power of section 70(1) and released a tidal wave of litigation

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<sup>15</sup>. Such inspection, as with a car, is not only to see if the property is suitable for the needs of the purchaser but also, in simple terms, to see if there is anything wrong with it.

<sup>16</sup>. Lest it be thought that the system of land charge registration was happy to countenance the destruction of the proprietary rights of persons in occupation where those rights were not protected as land charges (there being no equivalent of s.70 (1)(g) LRA 1925), see C. Harpum, [1990] CLJ 277 at 316 who argues persuasively that such protection was intended, but mistakenly omitted from the LCA 1925. See also *Megarry & Wade*, 6th edition (2000) para. 5-121.

<sup>17</sup>. See the discussion in *Royal Bank of Scotland v. Etridge* (2001) 3 WLR 1021.

that may still not have abated.<sup>18</sup> So, despite the fact that the case against overriding interests is not watertight, there are powerful arguments in favour of reform irrespective of the imperative of e-conveyancing, although whether such reform would ever have reached the statute book without the e-conveyancing dimension is open to question. Perhaps the “defects” would not have been thought defective enough to warrant root and branch reform. However, when the objective is to wholly re-shape the way land is transferred and to make the register both the *evidence* and the *origin* of the legal validity of a person’s title, achieved on-line with the absolute minimum of additional enquiries, then any diminution in the integrity of the register has to be minimised. Indeed, we should remember that although there is much talk of the “simultaneous” transfer and registration of titles and of third-party rights in land, this is inaccurate. It is not so much that the act of transfer/creation must occur at the same time as the act of registration; it is rather that the act of registration *is* the act of transfer/creation. Not only that, the act of registration (creation/transfer) must in due course be done electronically and not otherwise.<sup>19</sup> Clearly, the current large category of overriding interests cannot survive this

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<sup>18</sup>. The trail of litigation starts with *Pettitt v Pettitt* and the acceptance that, in the right case, a co-habitee may acquire a beneficial interest in property held of legal title by another. It leads next to *William & Glyn’s Bank v Boland* and the recognition of binding rights under s.70 (1)(g) LRA 1925. Then comes the counter punches of *Paddington BS v Mendelson* (deeming consent), *City of London BS v Flegg* (paramountcy of overreaching), *Abbey National BS v Cann* (closing the registration gap and the *scintilla* of time) and *Equity & Law Home Loans v Prestige* (implying consent on re-mortgage). In response to this, there is the now discredited *Woolwich BS v Dickman* (consents must be registered to be effective), but the altogether more effective *Barclays Bank v O’ Brien* (undue influence and misrepresentation). This led to *Bank of Ireland v Bell* (applying for sale despite a binding overriding interest), *Alliance & Leicester v Slayford* (mortgagee using alternative remedies) and finally *RBS v Etridge* (limiting undue influence). Is the next stop further litigation against allegedly negligent advising solicitors?

<sup>19</sup>. See section 93 LRA 2002 and the power to require such registration for matters specified in the Rules. It provides that a disposition or a contract to make a disposition of a registered estate or charge, or a third party right subject to the entry of a notice on the register “only has effect if it is made by means of a document in electronic form and if, when the document purports to take effect....it is electronically communicated to the registrar and the relevant registration requirements are met”. Thus, dispositions purported to be made in material form (or communicated to the registrar in material form) will create or transfer nothing at all. This goes much further than the existing principles of registration where failure to

- or rather, if they do, then the dream of e-conveyancing and title by registration cannot survive in the form found in the LRA 2002. Thus, it is with some justification that the Law Commission sees the existence of overriding interests as a “major obstacle” to its goal<sup>20</sup> and although there was a brief flirtation with the idea of abolishing the concept altogether, in the result the 2002 Act lays the axe to the tree with some vigour by both minimising the occasions on which an “interest that overrides” can affect a registered title and by encouraging the registration of interests that might otherwise take effect as such.

Apart from the change of name,<sup>21</sup> the first significant matter of note is that the Act now recognises that the effect of an interest that overrides depends on whether it is challenging a first registration of title or a disposition of a title that is already registered. Thus, interests overriding a first registration are dealt with in Schedule 1 (and made effective by sections 11(4)(b) and 12(4)(c) of the Act) and those overriding a registered disposition are dealt with in Schedule 3 (and made effective by sections 29(2)(a)(ii) and 30(2)(a)(ii) of the Act) and the simple effect of the distinction is that more interests will override a first registration and in a wider range of circumstances than will override a disposition of an already registered title. Schedule 1 is wider than Schedule 3. There is a double rationale for this. First, that the act of first registration itself (being in this sense purely administrative) should neither enhance nor diminish the effect of a proprietary right over land. That which did not bind before should not bind after registration and *vice versa*. Of this principle surely there can be little complaint. For example, equitable easements over land of unregistered title qualify as Class D (iii) land charges under s.2 (5) (iii) LCA 1972 and so must be registered to bind a purchaser of a legal estate in the land. It would be destructive of the parties’ pre-existing legal relationship and of the policy of the LCA 1925 if by the mere act of first registration, an unregistered Class D (iii) equitable easement could become an interest that overrides. Hence equitable

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create or register properly may result in the transferee obtaining an equitable interest in property. See below text accompanying n.100.

<sup>20</sup>. Report No. 271 at para. 8.1

<sup>21</sup>. Perhaps the intention is to signal the downgrading of the importance of these rights or to indicate that pre 2002 Act interpretations of the meaning and scope of “overriding interests” should not necessarily carry over?

easements are excluded from Schedule 1.<sup>22</sup> Similarly, although paragraph 2 of Schedule 1 confers overriding status on an “interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for an interest under a settlement under the Settled Land Act 1925”, this can refer only to those rights which, at the time of first registration, are already binding on the applicant for first registration.<sup>23</sup> Such rights would be binding prior to first registration primarily because the applicant had notice of the rights (the rights not being registrable as land charges),<sup>24</sup> or when the application for first registration is voluntary (i.e. not triggered by a dealing with the unregistered land), where the applicant is bound *inter partes* by the right. In neither case should the newly registered proprietor be able to escape the right by an act of first registration even if it would have become void against a purchaser had he sold the land.<sup>25</sup>

The second rationale is that, given that a major aim of the new legislation is to ensure that the register provides as accurate a picture as possible of the legal state of the land, the interval between a first registration and a first registered disposition is seen as an opportunity to ensure that more rights come onto the register (even if they could override) *and* to deny overriding status thereafter to those that contradict the paramount policies of the Act. There is in consequence a duty under s.71 (b) of the Act on a person applying for registration of a disposition to disclose information about rights which may fall within Schedule 3<sup>26</sup> and, as noted above, the scope of rights within Schedule 3 is narrower than

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<sup>22</sup>. Paragraph 3, Schedule 1. The exclusion also operates in respect of Schedule 3 rights (see below) and thus changes the position in respect of certain equitable easements under the LRA 1925, s.70 (1)(a) as interpreted by *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204.

<sup>23</sup>. Report No. 271, para. 8.1.

<sup>24</sup>. E.g. a beneficial interest behind a trust of land where there is only one trustee. Registered land charges would of course be automatically entered against the title.

<sup>25</sup>. A knowledgeable estate owner of unregistered title might, therefore, sell the land in order to defeat unregistered (but registrable) land charges, rather than apply for first registration. Indeed, perhaps such an owner could sell to their wife, *Midland Bank v Green*.

<sup>26</sup>. Rule 55 of the draft rules. The duty also extends to applicants for first registration concerning Schedule 1 rights, s. 71(a) and draft rule 27. The penalty for failure to provide the relevant information is not made clear. Note also that under s. 37 LRA 2002, “if it appears to the registrar that a registered estate is subject to an unregistered interest” he may enter a notice in respect of Schedule 1 rights (with some exceptions: see section 33 LRA 2002), thus removing their overriding status and putting them on the register.



those of Schedule 1.<sup>27</sup> Two further points may be made here. First, that it remains to be seen whether the combination of an efficient e-conveyancing system, the section 71 duty or the penalty of voidness (where it operates) really does encourage registration of rights in the interval between first registration and the first registered disposition. This rather suggests a degree of knowledge and understanding on the part of right holders (and their advisers) that might not exist. Secondly, given that the legislation denies continuing overriding status to certain property rights on the occasion of a registered disposition irrespective of the circumstances surrounding that disposition and despite the fact that they were effective at first registration, this might be thought to amount to a deprivation of property contrary to Article 1 of Protocol 1 to the European Convention on Human Rights etc. under the Human Rights Act 1998.<sup>28</sup> If so, this would trigger an investigation into the public utility of the legislation to assess its compatibility with human rights law. However, we must exercise caution here, because it remains to be seen whether many rights will *in practice* cease to be overriding on a registered disposition where they were overriding on a first registration *because of the LRA 2002* such as to trigger a human rights challenge. For example, many rights may be effective at first registration against the applicant simply because the applicant created the right in the first place and their subsequent voidness against a purchaser under a registrable disposition will be nothing more than a repeat of the rule we have now as to transactions concerning third parties. Thus, where A grants an option to purchase unregistered land to X which is not then registered as a land charge under LCA 1972, this remains effective against A after A applies for voluntary first registration *because A granted it*. If A then sells under registered disposition to B, the option is not an interest that overrides under Schedule 3 (absent patent actual occupation) and so is voided. But, it is voided not because of a difference between Schedule 1 and Schedule 3, but because of an application of normal

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<sup>27</sup>. The prime examples are legal easements and the rights of persons in actual occupation, being more narrowly drawn under Schedule 3 than under Schedule 1.

<sup>28</sup>. The Law Commission discuss the impact of human rights law on overriding interests that are phased out over a period of time (Report No. 271 para. 8.89), but not in respect of rights lost because of the differences between in Schedules 1 and 3 and caused by successive sales of the land. Of course, the fact that only a small number of persons may be affected by this problem does not mean that the provisions will be human rights compatible.

principles. So, for a human rights challenge to arise, we would be looking for a right binding at first registration because of Schedule 1, but ceasing to bind on a registrable disposition because of Schedule 3. This could be rare in practice. A possible example is where A conveys an unregistered title to B subject to X's legal easement which binds B as a legal right effective against the whole world. B applies for first registration of title and the legal easement becomes an interest that overrides under para. 1 Schedule 1 LRA 2002. However, should B then convey to C by registered disposition, X's right would not be an interest that overrides C's estate under Schedule 3 *if* the legal easement was not within the actual knowledge of C, not registered under the Commons Registration Act 1965, not been exercised within one year of the disposition and not obvious on a reasonably careful inspection of the land. The effect of Schedule 3 in these circumstances would be to deny effectiveness to a right guaranteed under Schedule 1 without any "fault" on the part of X, the owner of the easement. Indeed, although B may well have been under a duty because of section 71 to provide information that would have ensured that the legal easement could have been entered on the register, B's failure in this regard presumably cannot affect the innocent and unknowing owner of the legal easement. The result is that X is deprived of his right against the land because he now falls under Schedule 3, not Schedule 1. Admittedly, such cases may be rare (and perhaps can be tolerated for that reason), but much will turn on how courts interpret Schedule 3 rights, particularly the provisions concerning the discoverability of legal easements and the meaning of "patent" actual occupation that are not applicable under Schedule 1. An interpretation that shrinks the category of Schedule 3 rights by taking a narrow view of these provisions, despite the fact that the same rights in unchanged circumstances would have been binding under Schedule 1, could be a recipe for litigation and uncertainty.

In addition to this re-classification of "interests that override" according to the type of transaction they are to affect, the Act also radically alters the type of right that can have overriding status in the first place. The result is a considerably slimmer set of rights under *both* Schedules than those that take effect under s.70 (1) LRA 1925. As a very general guide, the 2002 Act provides that the following rights may override a first registration or a registered disposition, as they case may be. First, legal leases of 7 years

or less, with certain exceptions some of which are specific only to Schedule 3;<sup>29</sup> secondly, interests of persons in actual occupation, but where the category is significantly limited in comparison with section 70(1)(g) LRA 1925, particularly in relation to Schedule 3 rights;<sup>30</sup> thirdly, legal easements and profits, but once again restricted under Schedule 3;<sup>31</sup> fourthly, customary, public and mineral rights and local land charges;<sup>32</sup> fifthly, a miscellany of rights such as franchises and manors, some feudal in origin;<sup>33</sup> and finally, although not listed in either Schedule, a Public Private Partnership (PPP) lease also enjoys the status of a right that overrides.<sup>34</sup>

*(i) Rights recognised as within s. 70(1) LRA 1925 but now omitted from Schedules 1 and 3 LRA 2002*

Under the new scheme, there are a number of deliberate omissions from both Schedule 1 and 3 (when compared to s. 70(1) LRA 1925) though that is not to say that the substantive rights apparently omitted may not find some protection elsewhere in the Schedules or be otherwise protected by the legislation. There are a number of examples. First, equitable easements are deliberately omitted from the Schedules, despite being recognised as overriding interests within s.70 (1)(a) LRA 1925 as a result of the decision in *Celsteel v Alton*. The rationale for their exclusion from Schedule 1 has been noted above and their removal from Schedule 3 further advances the aim of ensuring that the register provides a near accurate picture of the legal state of the land. Interestingly, however, Law Commission Report No. 254, originally proposed that expressly granted

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<sup>29</sup>. The exceptions must therefore be registered to be effective against a third party even though they are of 7 years or less duration. See paragraph 1 of both Schedules.

<sup>30</sup>. Paragraphs 2 of both Schedules.

<sup>31</sup>. Paragraphs 3 of both Schedules.

<sup>32</sup>. Paragraphs 4, 5, 7-9 and 6 respectively of both Schedules and in identical terms.

<sup>33</sup>. Paragraphs 10-14 of both Schedules and in identical terms.

<sup>34</sup>. Section 90 LRA 2002, where PPP leases for the purpose of this Act are defined as “leases created for public-private partnerships relating to transport in London” (s.90 (6)). These are special statutory creations relating to the transport system in London and are included only because of their special character and with some reluctance on the part of the Law Commission. See Report No. 271 para. 8.11 et seq

easements should lose overriding status (because being expressly created they should be registered), but that *all* impliedly granted easements should continue to be overriding.<sup>35</sup> In other words, the original proposal was to trigger overriding status by reference to the *method* of creation (express or implied) rather than the *effect* of creation (legal or equitable). The 2002 Act, however, uses the legal/equitable distinction as the touchstone for inclusion within Schedules 1 and 3. In consequence, this means that impliedly granted equitable easements do not enjoy overriding status, even though they are by definition *not* expressly mentioned in a contract or other written instrument and so may easily be overlooked for registration.<sup>36</sup> This could have an adverse impact in two circumstances. First, impliedly created equitable easements of necessity, common intention or under the rule in *Wheeldon v Burrows*<sup>37</sup> no longer carry overriding status. Of course, given that most express contracts concerning land exclude the creation of such easements, this may not turn out to be a significant problem, but there is further potential here for litigation and uncertainty.<sup>38</sup> In this regard, we should note the recent *obiter dicta* in *K Sultana Saeed v Plustrade*,<sup>39</sup> which suggests that certain types of easement can qualify as an overriding interest under s. 70(1)(g) LRA 1925 because the claimant was in actual occupation of the portion of land subject to the easement: in this case, by using the parking space that was the subject matter of the easement. While there may well be doubts about whether the “actual occupation” provisions of s.70(1)(g) LRA (and hence of Schedules 1 and 3 of LRA 2002) support this type of “occupation”, it is easy to see how certain types of equitable easement may nevertheless squeeze into the new categories of “interests that override” through a flexible interpretation of their provisions. Secondly, easements generated by proprietary estoppel are necessarily equitable and there is no

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<sup>35</sup>. Law Commission Report No. 254 para. 5.24

<sup>36</sup>. Note, under the transitional provisions, any easement or profit which is an overriding interest at the time the Act comes into force, but would cease to be under Schedule 3, will retain its overriding status, Schedule 12, para. 9. This necessarily includes equitable easements currently classed as overriding interests because of *Celsteel v Alton*.

<sup>37</sup>. [1879] 12 ChD 31

<sup>38</sup>. In the case of easements impliedly granted as part of an equitable lease, it is arguable that the equitable easement will partake of the overriding status of the equitable lease (if any).

<sup>39</sup>. (2002) 25 EG 154. But see *Epps v Esso Petroleum* [1973] 1 WLR 1071.

written instrument at all by which their existence may be discovered or which may propel a right holder to register. Moreover, even though the inchoate equity of estoppel is now to be regarded as proprietary in nature (see section 116 LRA 2002), the right (inchoate or crystallised) must still fall within the protective ambit of the legislation and this might be difficult for easements.<sup>40</sup> In other words, making the overriding status of easements dependant on their legal or equitable character, rather than the manner in which they arose (expressly or impliedly) will remove a large category of right from the Schedules, but it does not sit well with the policy behind the rules on implied creation. Why insist that a person may not derogate from their grant or indulge in unconscionable conduct (and thus generate a right) only to see the right destroyed on a sale of the land. A reluctance to allow this could force strained interpretations of the 2002 Act in the same way that *Celsteel v Alton* and now *K Sultana Saeed v Plustrade* have done with the 1925 registration statute.

A second major change is that the Schedules make no mention of the rights of persons acquiring or having acquired rights under the Limitation Acts. The rights of adverse possessors *per se* will no longer be overriding. In fact, however, this is not as drastic a change as might first appear. Law Commission Report No. 271 makes it clear that the rights of adverse possessors will override a first registration or a registered disposition if the adverse possessor is in actual occupation of the land according to the terms of the respective Schedules. In other words, an absent adverse possessor has no protection. On balance, this seems a fair compromise between the rights of the purchasing third party and the adverse possessor and it was well supported by the consultation process.<sup>41</sup> Of course, there may be difficulties over the meaning of “actual occupation” especially in the light of the provisions of Schedule 3 as they apply to semi-derelict land where the initial acts of adverse possession may be slight and the evidence of “patent” actual occupation very slim. However, it may well be that cases of adverse possessors in the process of acquiring rights but who are not in actual occupation will be rare in practice, and for adverse possessors who have acquired rights, the legislation

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<sup>40</sup> . It seems that only the actual occupation provisions of the Schedules will offer this protection, but that may well not suffice for estoppel easements, *K Sultana* aside.

<sup>41</sup> . Report No. 271 para. 8.78, noting an approval of over 80% of those who commented.

already provides mechanisms by which the adverse possession can claim the registered title, with provisions of like intent found in LRA 2002.<sup>42</sup> Importantly, the rights of persons who have acquired the right to be registered as proprietor (i.e. who have completed the relevant period of adverse possession) but who have left the land without such registration will cease to be overriding, unless the issue is one of first registration where the applicant will be bound by the rights of adverse possessors of which he had notice, irrespective of actual occupation (sections 11(4)(c) and 14(4)(d) LRA 2002). Although this may well be perceived as an attack on the very notion of adverse possession, it does in fact serve two policy masters: it further protects a purchaser from undiscoverable and unregistered but binding rights and, perhaps unintentionally, it can be seen as supporting the one of the justifications for adverse possession by disapplying the claim to title of one who is not utilising the land economically or socially. In fact, the change away from automatic protection of the rights of adverse possessors also encapsulates one of the major philosophical pillars of the new Act: that in a registration system, possession alone should not generate title. This change in the manner of the protection given to adverse possessors is thus a counterpart to the emasculation of the concept of adverse possession in registered land.<sup>43</sup>

Thirdly, overriding status is no longer accorded to the rights of persons in receipt of rents and profits of the land. Formerly, as is well known, this sat somewhat uncomfortably within s.70 (1)(g) LRA 1925 but it finds no counterpart in Schedules 1 and 3, either on its own account or as part of the “actual occupation” provisions. It is clear from Law Commission Report No. 254, that the proposal to remove the overriding status of the rights of such persons was controversial,<sup>44</sup> especially as it might cause substantial loss to intermediate landlords holding leases of over 21 years who had failed

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<sup>42</sup>. By applying for registration of title after 12 years adverse possession under the current law or under the right to apply for registration after 10 years under the LRA 2002.

<sup>43</sup>. See below. Note that under the transitional provisions, an adverse possessor who has already satisfied the limitation period has three years from the entry into force of the Act to apply for registration as proprietor against either the person applying for first registration or the person seeking registration of a registered disposition (as the case may be), irrespective of whether he was in actual occupation at the relevant time, Schedule 12 para. 7 and para. 11.

<sup>44</sup>. Report No. 254 at paras. 5.64 – 5.68.

to register their titles. The Commission was clearly sympathetic to this view and resisted the temptation to say that such landlords *should* have registered, or at least should have employed competent lawyers. In the result, the overriding status of such persons is removed, with the Commission rightly noting that the risk of “hard cases” will be much reduced when full e-conveyancing takes hold. At that time it will not be possible to create long leasehold interests without electronic registration so the problem of the valid, but unregistered and non-overriding long lease will disappear. There will be no lease to protect. Of course, there may be other cases where the removal of overriding status causes hardship – e.g. a landlord of an intermediate equitable lease of seven years or less who has further sub-let<sup>45</sup> - but on balance this seems again to be a fair compromise between the need to produce an accurate register and the claims of those with adverse rights over the land.<sup>46</sup>

Fourthly and finally, there are other miscellaneous rights omitted from Schedules 1 and 3 that currently have a home in s.70(1) LRA 1925. Chancel repair liabilities (see s. 70(1)(c) LRA 1925) are not found in either Schedule because they are no longer enforceable following the Court of Appeal’s decision in *Aston Cantlow etc PCC v Wallbank*<sup>47</sup> that such liabilities (being in the nature of a public tax on private land) are not compatible with human rights obligations.<sup>48</sup> In addition, rights guaranteed under s.70(1)(h) LRA 1925, being rights in respect of possessor, qualified or good leasehold title that are excepted from the effect of registration are no longer overriding interests. This is simply because the type of rights that could bind the registered proprietor of such a “limited” estate as overriding interests are in any event binding elsewhere under the

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<sup>45</sup>. This person is not in actual occupation and has no title to register. Their lease would not be overriding under Schedule 1 or 3.

<sup>46</sup>. Under the transitional provisions, any person holding an overriding interest by virtue of receipt of rent and profits will continue to do so under Schedule 3 until they cease to receive such rent and profits, Schedule 12, para. 8 LRA 2002.

<sup>47</sup>. [2001] 3 WLR 1323.

<sup>48</sup>. It seems that an appeal to the House of Lords is due to be heard shortly (leave given [2002] 1 WLR 713) and it may be that the Law Commission’s pragmatic decision not to deal with such liabilities will be regretted.

legislation.<sup>49</sup> In essence, this tidies up an anomaly under the 1925 legislation the reason for which was not apparent.<sup>50</sup>

*(ii) Short legal leases*

Paragraphs 1 of Schedules 1 and 3 of the 2002 Act respectively provide that legal leases not exceeding 7 years from the date of the grant shall override a first registration or a registered disposition. Although there are some exceptions where overriding status is denied even for these short leases (the more so for Schedule 3), this is the obvious counterpart to s. 70(1)(k) LRA 1925, save that the qualifying period is reduced from the 21 years of the earlier statute.<sup>51</sup> The rationale is both practical and designed to support the e-conveyancing revolution. It seems that the average length of a business lease is now some ten years and it is undesirable that this most common of legal estates should escape substantive registration. Likewise, not only does the existence of large numbers of binding longer leases impair the integrity of the register, the advent of e-conveyancing, with its “simultaneous” registration/creation provisions will provide a simple and relatively inexpensive way of bringing these rights on to the register. Consequently, under the LRA 2002, the leasehold estate that may be registered with its own title is pitched at leases of over 7 years.<sup>52</sup> Indeed, as is also well known, the Law Commission hope that it will be possible to reduce both qualifying periods still further so that eventually there will be complete symmetry between the rules governing the formal creation of legal leases and their registration. Hence, in due course, it is anticipated that only legal leases for three years or less will qualify as overriding interests (this being the

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<sup>49</sup> . Under ss. 20(2), (3) & 23(2)(3)(4) LRA 1925 and see section 12(6)(7)(8) LRA 2002.

<sup>50</sup> . Report No. 271, para. 2.103 et seq. and Report No. 254 para. 5.79.

<sup>51</sup> . Under the transitional provisions, legal leases between 7 and 21 years will remain as overriding interests, Schedule 12, para. 12 LRA 2002, but an assignment of such a lease with more than 7 years left to run will indeed trigger its registration: see section 4(2)(b) which identifies such leases as qualifying estates for the purposes of the registration requirement of section 4(1)(a) LRA 2002.

<sup>52</sup> . An amendment to the Bill pitching the qualifying period at 14 years was defeated in Parliament. With respect to its proposers, there seemed little to justify this save only an unquantified fear about “the costs” and a luddite fear of the dangers of e-conveyancing.



period for which no formality is required create a legal estate). All other legal leases will be electronically registrable as a condition of their existence. Without doubt, this change will go a long way to achieving the aims of the 2002 Act and the introduction of e-conveyancing should itself ensure that the Registry is not drowned in the flood of new registrable titles. For sure, the simple volume of such titles is going to increase, with consequential increased burdens on the resources of the Registry, but the burden will become unmanageable only if this provision is brought into effect significantly before the introduction of e-conveyancing. As to the exceptions where overriding status is denied to short leases, these are specific rather than indicative of some general policy. They are fully explained in Law Comm. Report No. 271 and the Explanatory Notes to the Act. Thus, as against first registration (Schedule 1), a reversionary legal lease taking effect in possession more than 3 months after the date of grant, a legal lease granted under the right to buy provisions out an unregistered legal estate and a legal lease granted to a former secure tenant under a preserved right to buy out of an unregistered legal estate must all be completed by registration.<sup>53</sup> The last two already are excluded from the category of overriding interests<sup>54</sup> and the exclusion of reversionary leases is because many are hard to discover and the 2002 Act vigorously pursues a policy of denying overriding status to undiscoverable rights. The three exceptions also apply to Schedule 3 rights,<sup>55</sup> together with such short leases (i.e. those not exceeding 7 years) as amount to a registrable disposition and so require registration for completion.<sup>56</sup> In essence, these additional exceptions for which overriding status is denied are the registered land version of the previous three exceptions (i.e. they apply where the relevant grant is out of a *registered* estate) plus a “discontinuous lease”, otherwise known as a time share legal lease where possession is exclusive for set periods, but where those periods are not

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<sup>53</sup> . Section 4(1)(b)(d)(e)LRA 2002.

<sup>54</sup> . See Housing Act 1985.

<sup>55</sup> . Such reversionary leases cannot be overriding interests under the actual occupation provisions of Schedule 3, being expressly excluded, Schedule 3 para. 2(d)

<sup>56</sup> . Schedule 3, para. 1(b), referring to “registrable disposition” under section 27(2) LRA 2002.

continuous<sup>57</sup> and a legal lease of a franchise or manor (where this is the relevant registered estate).<sup>58</sup>

*(iii) Actual occupation under the LRA 2002*

The provisions concerning the overriding status of the rights of persons in “actual occupation” are central to the attempt in the 2002 Act to diminishing the range and scope of unregistered interests that might bind a purchaser of land. Not only are these rights common, and under current law act as a positive disincentive to registration,<sup>59</sup> they would seriously jeopardise the effectiveness of e-conveyancing. Their very existence requires a physical inspection of the land in order to discover the occupation. Consequently, while the Law Commission was clear that, as a category, they should remain a feature of the 2002 Act,<sup>60</sup> the pressure for reform was considerable. In particular, it was believed imperative to ensure that unregistered and *undiscoverable* overriding interests should not affect a purchaser.<sup>61</sup>

As to specifics, mention has been made already of the removal of the “rents and profits” limb of s. 70(1)(g) for both Schedule 1 and Schedule 3 rights.<sup>62</sup> Also excluded from both Schedules are rights arising under the Settled Land Act 1925, mirroring the position under the current law<sup>63</sup> and, in any event, such rights will become rarer under the terms of the Trusts of Land etc. Act 1996. Similarly applicable to both Schedules, and representing a change in the law, is the proviso that rights of persons in actual occupation are overriding only in so far as they relate to the land occupied by the claimant: in other words, the legal extent of the interest that overrides under paragraphs 2 of Schedules 1 and 3 is to be co-terminus with the extent of the actual occupation. This is a deliberate

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<sup>57</sup>. Section 27(2)(b)(iii) LRA 2002.

<sup>58</sup>. Section 27(2)(c) LRA 2002.

<sup>59</sup>. Unregistered minor interests may still gain protection through s. 70(1)(g) LRA 1925.

<sup>60</sup>. Report No. 271 para. 8.53.

<sup>61</sup>. Considered below. See also the same imperative in the rules concerning legal easements and reversionary leases excluded from overriding status.

<sup>62</sup>. *Supra*.

<sup>63</sup>. Section 86(2) LRA 1925.

reversal of *Ferrishurst Ltd v Wallcite Ltd*<sup>64</sup> and is the clearest possible indication that the role of “actual occupation” now is to serve as a warning to a prospective purchaser of the existence of adverse rights. Thus, the policy is that only those rights fortified by discoverable and relevant actual occupation should be overriding. As the Law Commission suggest, this may have been the law prior to *Ferrishurst*<sup>65</sup> and given the lack of cases raising the issue, it is unlikely to cause much hardship to disappointed claimants. It is not demeaning the reform to say it is in the “tidying up” category rather than representing a major policy shift.

The same cannot be said of the re-definition of “actual occupation” under Schedule 3 of the Act. Although applicable only to Schedule 3 rights this is a major policy shift. Under the current s.70 (1)(g) LRA 1925, the rights of persons in actual occupation are overriding interests whether or not they discoverable by a purchaser. Hence, the undiscoverable right can bind a purchaser and the purchaser is denied the opportunity of walking away from the purchase or taking steps to avoid the overriding interest.<sup>66</sup> Under Schedule 3, rights of persons in actual occupation are nevertheless excluded from overriding status in two cases: first, where enquiries were made of the right holder and he failed to disclose the right in circumstances where he could reasonably be expected to do so; and secondly, where the right holder’s actual occupation would not have been obvious on a reasonably careful inspection of the land and the person who might be bound did not have “actual knowledge” of the interest at the time of the disposition. The first of these is a reformulation of s.70(1)(g), but it is not so absolute in its penalty for failure to disclose.<sup>67</sup> Thus, the right holder loses overriding status (after failure to disclose) only if disclosure could reasonably be expected to be made. So, for example, where the right holder did not know, and could not reasonably be expected to

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<sup>64</sup>. [1999] Ch 355. The claimant enjoyed a right extending to the entirety of the premises but was in actual occupation of only part. The Court of Appeal held that the right in its entirety was enforceable as an overriding interest.

<sup>65</sup>. Report No. 271 at para. 8.56, citing *Ashburn Anstalt v Arnold* [1989] Ch 1 at 28 per Fox LJ

<sup>66</sup>. E.g. by overreaching where applicable or by seeking the consent of the right holder.

<sup>67</sup>. The qualification does not limit Schedule 1 rights because the act of first registration should not change the extent to which the applicant for first registration is bound by pre-existing rights. Hence, disclosure is irrelevant in respect of rights that then exist and even if the applicant does not know of them.

know that they actually had a right (e.g. in cases of uncrystallised estoppel perhaps?), failure to disclose when asked does not result in loss of overriding status. While this is a welcome reform – and to some extent the counterpart of making inchoate estoppels proprietary (s. 116 LRA 2002) – it may well lead to a certain amount of litigation. For example, is it “reasonable” to expect disclosure when the right holder knows that the consequences of disclosure will be the loss of the family home because the purchaser will take steps to acquire the property free from the right? Presumably it is, because otherwise it will always be permitted to withhold disclosure if that would result in the loss of a property right and that would defeat the point of the provision. However, the circumstances in which a person may be asked about their rights are many and varied, and the introduction of a reasonableness criterion must introduce an element of uncertainty.<sup>68</sup>

The second limitation on “actual occupation” rights under Schedule 3 is more controversial. It is designed, of course, to prevent the overriding status of undiscoverable rights: hence the *actual occupation* (not the right) must be “obvious” on a reasonably careful inspection of the land and *the interest* must not be within the “actual knowledge” of the person affected. There are two broad points of interest here. First, how valid is the principle behind Schedule 3 that it is desirable to avoid the bindingness of undiscoverable rights and, secondly, is para. 2 of Schedule 3 likely to be effective in practice.

As to the first issue, there is something in the psyche of property lawyers that rebels against a purchaser being bound by rights whose existence they could not possibly discover – even though this could have been true of “legal rights” in unregistered land.<sup>69</sup> We must be careful, however, to distinguish undiscoverable rights from *undiscovered* ones. There are legions of cases under the LRA 1925 where a purchaser failed to discover an overriding interest – often through simple incompetence. The early mortgage cases are good examples where sloppy lending practices or the desire to offer mortgages as quickly

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<sup>68</sup>. For example, is it reasonable to expect disclosure if the right holder has been misled by the vendor of land about the true nature and extent of their rights, or (estoppel aside) been misled by the purchaser about the effect of a proper disclosure?

<sup>69</sup>. Of course, the assumption is that because legal rights are generally created formally, their existence will be made clear by the act of formality, usually the deed of grant.

as possible without regard to the consequences resulted in a plethora of *Boland* type cases. Indeed, it is not stretching a point to say that these discoverable, but undiscovered interests led to a litigation industry in the law of consent and undue influence when the lenders did become wise to the problem. By way of contrast, there are relatively few cases turning on the truly *undiscoverable* overriding interest: that is, cases where any reasonably prudent purchaser simply could not have discovered the existence of an adverse right and so never had the opportunity to take avoiding action. We might include in the list *Ferrishurst v Wallcite* (now dealt with as above), *Chokkar v Chokkar*<sup>70</sup> (the hidden wife in hospital), *Kling v Keston*<sup>71</sup> (the apparently unoccupied garage) and, more recently *Malory v Cheshire Homes*<sup>72</sup> (actual occupation through the erection of a fence by the claimant on land believed to belong to the vendor). Others are harder to come by: indeed, so hard that the various Law Commission Reports offers little evidence from the *case law* that there is a problem (as opposed to expressing their and others inherent dislike of such hidden rights).<sup>73</sup> Moreover, it is not the case that the e-conveyancing imperative necessarily requires the hard stance of Schedule 3. It is the *existence* of all types of interest that override that affect e-conveyancing so dramatically and the relative scarcity of truly undiscoverable interests is hardly likely to have a significant impact. In other words, perhaps this is a reform born of reaction rather than analysis. Even then, assuming we accept that it is desirable to prevent a purchaser being bound by an undiscoverable right (even though it happens rarely), it is arguable that Schedule 3 should have included some reference to the *reasons* why the right (or the actual occupation which protects it) is undiscoverable. If the undiscoverability is because of the nature of the right (e.g. *Ferrishurst*) or blameless chance (*Kling*), the balance may be thought to lay with purchaser for this supports the free alienability of land. Where, however, it is because of some devious act of the vendor (as in *Chokkar*), the absolute rule in Schedule 3 serves only to punish the innocent. In short, given that it was thought necessary to

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<sup>70</sup>. [194] FLR 313

<sup>71</sup>. (1983) 49 P & CR 212

<sup>72</sup>. (2002) 1 WLR 3016. Leave to appeal to the house of Lords has been granted.

<sup>73</sup>. See Law Comm No. 271 at para. 8.62 and Law Comm No. 254, referring to the obligations to disclose latent defects of title.

remove overriding status from the undiscoverable right, we should recognise that this embodies a policy choice in favour of the purchaser. Given that it does, there are other policy factors that, in some cases, might re-dress the balance in favour of the undiscoverable occupier. These are now excluded by the firm rule in Schedule 3 and the Act may well be the poorer for it.

Secondly, even if we accept that change was necessary, is the form of Schedule 3 the best that could be achieved. It may be, but perhaps the jury is still out. As noted, it is the actual occupation (not the right) that must be “obvious” on a “reasonably careful inspection” of the land. This then, is not intended to be a re-incarnation of the doctrine of notice and we can but hope that Her Majesty’s judges do not interpret it this way.<sup>74</sup> These judges will, of course, have to determine what “obvious” means, along with what amounts to a “reasonably careful” inspection, and as each case must be determined by its own facts, this Schedule may well turn out to be a litigation generator. This will be bad enough, but the impulse to litigate is likely to come from purchasers, especially institutional lenders, who will argue that the actual occupation was not patent and that they should escape being affected by the right. Moreover, if courts take a narrow view of the paragraph, there may well be an erosion of the current law and perhaps even the undiscovered (but *discoverable*) occupation may not be thought sufficient to generate an interest that overrides. This will not be consistent with the purpose behind the Schedule, but it is a fair bet that many of the *Boland* type cases would have been decided in favour of the lender (simply because the lender did not discover the occupation) had Schedule 3 been the operative provision instead of s. 70(1)(g).<sup>75</sup> The author does, of course, accept that many of these fears may prove unfounded. However, it is submitted that this change to the “actual occupation” provisions is driven more by a desire to protect purchasers from anticipated fears than by any overbearing practical considerations. It *seems* the right thing to have done. Let us hope that it turns out to be so.

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<sup>74</sup>. Given that principles of unregistered land still are infiltrated into the registered land system, to unpredictable effect (see most recently *Malory v Cheshire Homes*), we should not be too sanguine.

<sup>75</sup>. Providing, of course, that the lender does not have “actual knowledge” of the right under para. 2 c (ii) of Schedule 3. This is, indeed a version of notice, but a fair counterweight to the other provisions of para. 2 of the Schedule.

*(iv) Legal easements*

Another change to the scope of overriding interests currently found in the LRA 1925 concerns legal easements. We have noted above that all equitable easements as a class are now excluded from the Schedules and in fact even the provisions concerning legal easements are limited in scope. As regards Schedule 1 interests, all legal easements are included, once again following the policy that an act of first registration should neither enhance nor restrict the bindingness of a proprietary right. Legal easements would have bound in the law of unregistered title, hence they must bind at first registration. However, by way of contrast, Schedule 3 is more narrowly drawn than Schedule 1 and not all legal easements will override a registered disposition of a registrable estate.<sup>76</sup> Once again, this change is driven by the policy of ensuring that only discoverable rights may be overriding or, in the case of easements, also because they are used relatively frequently.<sup>77</sup>

Consequently, legal easements will override a registered disposition under Schedule 3 if, but only if, the easement is registered under the Commons Registration Act 1965, or it is actually known of by the purchaser, or it is obvious on a reasonably careful inspection of the land, or it has been exercised within one year prior to the relevant disposition.<sup>78</sup> These are alternatives so, for example, an undiscoverable but used easement (possibly underground television cables) will be protected. In truth, the list of qualifying legal easements is comprehensive and it may well be that few are denied overriding status in practice by these provisions. Of course, there may be some interpretative difficulties (as before) over “obvious on a reasonably careful inspection”, especially in relation to long-

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<sup>76</sup>. Under the transitional provisions, any easement that is overriding at the time the Act comes into force will retain that status and *all* legal easements will be overriding for 3 years after the Act is brought into force, so providing a period of three years grace for those that would be disqualified under Schedule 3, see Schedule 12, para. 10 LRA 2002.

<sup>77</sup>. Note, there is no similar safety net for frequently used rights in the actual occupation provisions of the Schedules. In that case, the right must be discoverable and is not saved if it is frequently used. Perhaps, however, in actual occupation cases, it is impossible to have a non-discoverable but frequently used right?

<sup>78</sup>. Para 3 Schedule 3.

disused land where the “one year use” proviso may not apply. All in all, however, when taken against the policy aims of the legislation and the dictates of e-conveyancing, of itself this again represents a fair compromise between purchasers and users of land.<sup>79</sup> Indeed, we should also note that in time the category of “legal” easements that are unregistered but overriding will shrink. Under the e-conveyancing provisions and the formality provisions of the LRA 2002,<sup>80</sup> no expressly created legal easement will be able to exist at all unless it is created electronically and entered on the register. They will not override because they will not exist. Thus, the category will be limited to impliedly created legal easements and even then the standard conveyancing practice of excluding the creation of implied easements on the sale or lease of land means that the category will be small.

*(v) Time restricted rights*

Finally in this analysis of interests that override under the LRA 2002, we should note that the status of a group of rights as overriding a first registration or a registered disposition is time limited. Under section 117 of the Act, five types of right will cease to have overriding status both under Schedule 1 and Schedule 3 ten years after the Act is brought into force. These are a miscellaneous category of rights, some feudal, some historic and includes franchises, a manorial right, a crown rent, a non-statutory right in respect of a sea wall or river embankment and a corn rent.<sup>81</sup> They are to be phased out on the ground that most can no longer be created and that those persons with the benefit of them should be aware of their existence and of the need to enter them on the register. The last point is, of course, debatable, but the Law Commission believe that the removal of the status of such rights is justified as matter of land registration policy and will not contravene human rights provisions.<sup>82</sup> Once again, while the consultation process revealed this to be a

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<sup>79</sup>. Note once again the potential for litigation because of the different provisions in Schedules 1 and 3.

<sup>80</sup>. I.e. for the creation of proprietary rights, see below pp.

<sup>81</sup>. Identified in paragraphs 10 to 14 of Schedules 1 and 3 LRA 2002.

<sup>82</sup>. Report No. 271 para. 8.88 et seq.



supportable hope, only time will tell whether the relevant provisions will be free from human rights attack.

***B: The emasculation of adverse possession in relation to registered land***

Part 9 of the 2002 Act contains provisions relating to the operation of principles of adverse possession in relation to land of registered title. As is now well known, the essential feature of this new system is that no period of adverse possession will of itself give a title to the possessor and in this sense, there is no period of limitation in respect of claims to recover possession of registered land.<sup>83</sup> In its place, an adverse possessor is given the right to apply to be registered as proprietor after a minimum period of ten years adverse possession, itself to be calculated according to the current principles.<sup>84</sup> This application requires the Registrar to notify the registered proprietor (and certain other persons<sup>85</sup>) of the application. The persons notified then have a further period to be determined by Rules<sup>86</sup> to serve a counter-notice. The effect of the adverse possessor's application is then decided. So, if the persons notified do not serve a counter-notice claiming the benefit of the Act, the applicant "is entitled" to be registered as proprietor of the estate in respect of which he applied.<sup>87</sup> If an appropriate counter-notice is served, then subject to three exceptions, the application to register must be rejected and the registered proprietor is given two years to take possession proceedings against the adverse

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<sup>83</sup>. Section 96(1) & (2) LRA 2002 disapplies the limitation periods in respect of estates in registered land (except that of a chargee) and section 96(3) provides the coup de grace that "section 17 of that Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of this section, a period of limitation does not run against him".

<sup>84</sup>. Note, however, that although the applicant may lodge an application as being the successor to a prior adverse possessor (with ten years adverse possession in total), an applicant may not apply if they have dispossessed a former adverse possessor. In that case, they must accrue ten years in their own right, see Schedule 6 para. 11 LRA 2002. Certain persons of limited capacity may not make an application, see Schedule 6 para. 8.

<sup>85</sup>. Schedule 6 para. 2(1).

<sup>86</sup>. But expected to be three months, see Report No. 271 para. 14.32.

<sup>87</sup>. Schedule 6 para. 4 LRA 2002

possessor. Failure to take such proceedings entitles the adverse possessor to apply for, and be given, registration at the expiry of the two-year period.<sup>88</sup>

This simple scheme does, of course, mean the end of adverse possession as a threat to the security of registered title, save in cases where the registered proprietor genuinely has no use for the land (and does not wish to keep it) or if one of the exceptions applies. Adverse possession for any length of time (e.g. 50 years) will not of itself confer title (there is no limitation period) and the registered proprietor will always be warned before the possibility of losing their estate arises.<sup>89</sup> Even then, in most cases a further two years period of grace will exist. A direct and intended consequence will be the voluntary registration of large areas of unregistered land, especially in those cases where the estate owner has difficulty keeping track of the state of their land and wishes to utilise the warnings given by the registrar.<sup>90</sup>

Once again, this radical reform is justified by the paramount policy of bringing maximum security to registered titles so that they may be dealt with efficiently under e-conveyancing. It is also a reflection of a political philosophy that adverse possession is “land theft” and that it is inherently inconsistent with a registration system. Of course, there is merit in both these views: modern expositions of the law on adverse possession appear to have favoured the rights of possessors over the rights of paper owners (making successful claims all the more likely)<sup>91</sup> and the existence of an off-register mechanism for destroying titles seems to make a mockery of the state guarantee of title in registered

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<sup>88</sup>. Or such time as the possession proceedings end if commenced within the two year period, Schedule 6 para. 6(2) and para. 7 LRA 2002.

<sup>89</sup>. As Professor David Clarke noted (WG Hart Symposium, London University 2002), much also depends on the simple fact of being able to locate the person to whom notices should be sent.

<sup>90</sup>. For example, land owned by local authorities (always fertile ground for claims of adverse possession: see *Lambeth BC v Ellis* and the consequential flood of claims) and large agricultural holdings (e.g. *Pye v Graham*).

<sup>91</sup>. See, for example, *Buckinghamshire CCs v Moran*, *Hounslow LBC v Minchinton*, *Lambeth BC v Ellis* and *Blackburn v Lambeth BC*. The House of Lords decision in *Pye Developments v Graham* [2002] 3 All ER 865 confirms this trend, albeit that the judgment is not political but declaratory of the law on adverse possession as it is properly to be understood. See M. Thompson, *Adverse Possession: The Abolition of Heresies* [2002] Conv. 480

land.<sup>92</sup> On the other hand, the social and economic justifications for principles of adverse possession have been well documented<sup>93</sup> and instead of “land theft”, adverse possession can be seen as encouraging “productive land use”. Again, there is nothing *inherently* contradictory in having principles of adverse possession operate in registered land, at least if those principles are seen positively as a method of transferring title from one person to another<sup>94</sup> instead of a method of unfairly snatching it from them. It is a matter of perception, not of incontrovertible logic. Consequently, given that the Act has chosen to emasculate adverse possession – and so favours one policy perspective – we must be alive to the possibility that there will be some creative interpretation of the relevant provisions by a differently minded judiciary.

It is submitted that this battle will be fought around the interpretation of the three exceptions referred to above: that is, those cases where despite the registered proprietor serving a counter notice, the applicant may be registered as proprietor without waiting for a further two years to see if the paper owner commences possession proceedings. The three situations are: first, that it would be unconscionable because of estoppel for the registered proprietor to dispossess the applicant and the applicant should in all the circumstances be registered;<sup>95</sup> secondly, where the applicant is for some other reason entitled to be registered as proprietor;<sup>96</sup> and thirdly, where there is a boundary dispute concerning adjoining land, the applicant believing for at least ten years that the relevant land was his and where the estate to which the application relates has been registered for at least one year.<sup>97</sup> The third of these is relatively straightforward and admits of little doubt. It does provide comfort to those who argue that adverse possession plays a vital role in the settlement of minor boundary disputes. It does, and will continue to do so under the provisions of the 2002 Act. However, the first two exceptions are of a different order. The first is the most open-ended and may well prove to be the opening through

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<sup>92</sup>. It is also inconsistent with moves to establish a national land catalogue under the auspices of the NILS

<sup>93</sup>. See e.g. Dockray [1985] Conv. 272.

<sup>94</sup>. This is the philosophy behind *Central London Commercial Estates v Kato Kagaku Ltd.* [1998] 4 All ER 948 and s. 75 LRA 1925.

<sup>95</sup>. Schedule 6 para. 5(2) LRA 2002.

<sup>96</sup>. Schedule 6 para. 5(3) LRA 2002.

<sup>97</sup>. Schedule 6 para. 5(4) LRA 2002.

which determined judges drive the horse and cart. In principle, it concerns cases of estoppel, arising from unfairness or injustice and Law Commission Report No. 271 gives various examples.<sup>98</sup> In practice, however, not only is the very scope of estoppel at best fluid and at worse entirely discretionary, the words of para. 5(2) of Schedule 6 admit of a wide variety of interpretations. It is even possible that the courts might develop a *de facto* limitation period where (say) 20 years adverse possession raises a presumption that an estoppel exists so that it would be proper (absent special circumstances) to grant an application for registration by an adverse possessor even if the paper owner did serve a counter-notice. This is not far fetched, as the history of the LRA 1925 is littered with imaginative interpretations of apparently clear statute in order to achieve what the court thinks is a desirable social goal. Even the second exception – that the applicant is for some other reason entitled to the land – which the Law Commission regards “more straightforward”<sup>99</sup> is not limited by the legislation to the examples provided by the Law Commission in its Report. What is meant is that if the adverse possessor has some other right to the land irrespective of their adverse possession – such as under a will or constructive trust – then registration as proprietor may be given on first application despite opposition from the paper owner. Note, however, that not all these “other rights” are as concrete and as certain as a right under a testamentary disposition. It takes no imagination at all to foresee a decision where first the adverse possessor is said to be the beneficiary under some kind of constructive trust (the “other right”) and the reasons for the imposition of the trust in the first place are then used a second time to justify registration as proprietor under the statutory exception. Perhaps this is what is intended, but the provision is opaque.

Once again, the point here is not that the provisions of the LRA 2002 are fatally flawed or misguided. As regards adverse possession they reflect a powerfully supported policy position and, while not everyone may agree with it, that policy cannot be dismissed lightly. It can, of course, be challenged, and some might argue that the provisions on adverse possession in the Act were not actually necessary for an effective

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<sup>98</sup>. Report No. 271 para. 14.42, including building on another’s land and informal sales for valuable consideration of part of land.

<sup>99</sup>. Report No. 271 para. 14.43.

reform of the land registration system, even when considering the imperatives of e-conveyancing. The point is rather that if these doubts are shared by those responsible for implementing and interpreting the LRA 2002, especially in cases of apparent hardship and unfairness, then we may see the re-emergence through imaginative interpretation of the legislation of a *de facto* limitation period in registered land.

### **C: Formalities for the creation of rights: new procedures and estoppel**

The final issue covered in this essay concerns the requirements introduced by LRA 2002 for the creation and transfer of proprietary rights and their relation – if any – to proprietary estoppel. In turn, this is related directly to the provisions concerning e-conveyancing and in this regard much remains as yet uncertain. Detailed provision will be made by the Rules and the consultation exercise for the first set of Rules started in the summer of 2002. Perforce we must deal at this stage with the principles established by the Act in the knowledge that they may be tempered or strengthened by the anticipated land registration rules.

The LRA 2002 is explicit that e-conveyancing means much more than using electronic media to communicate with the Land Registry. Schemes of that ilk exist already. The scheme of e-conveyancing proposed by the Act is far more radical and will result in dramatic changes to the way property rights are created and transferred. In time, it will render the distinction between “legal” and equitable” property rights largely irrelevant in land of registered title. The first step will be the implementation of legislation permitting the conclusion of valid contracts and deeds in electronic form. For contracts, this will occur through an Order made under section 8 of the Electronic Communications Act 2000, inserting a new clause 2A into the Law of Property (Miscellaneous Provisions) Act 1989 authorising the conclusion of contracts by electronic media. For deeds, the Order may insert a new section 144A into the Land Registration Act 1925 effectively permitting the electronic creation of documents that are to have the effect of a deed, although this will not be needed if section 91 LRA 2002 is brought into force as this has the same effect. In other words, the effect of these changes

will be that it will be possible to create or transfer proprietary rights either by material (written) contract or deed or by electronic media having the same effect.

At first, these material and non-material contracts/deed will exist side by side and the registration of the contract/deed (however brought into existence) will be required in the same circumstances and for the same reasons as under the current law.<sup>100</sup> In short, there will simply be another way of executing a valid contract or deed.<sup>101</sup> However, in due course, this dual scheme will be superseded by a more radical system. When section 93 LRA enters force, it will be possible to specify that certain dispositions “only have effect” if they are created electronically and are electronically registered. This is critical and lies at the heart of the e-conveyancing system. It means that it will not be possible to create certain types of proprietary right unless this is done electronically and providing they are simultaneously electronically registered. In effect, the act of electronic registration will be the act of creation. The rights subject to these provisions could in due course encompass all registered dispositions and all third party rights capable of protection by the entry of a notice on the register.

Clearly, this represents a profound change in the way we perceive and create proprietary rights and obligations. At present, failure to register a properly created right that requires such registration to exist as a legal interest renders that interest purely equitable. Likewise, failure to use the proper form for the creation of a legal right may nevertheless create an equitable one.<sup>102</sup> Indeed, despite being purely equitable, these transactions do create obligations between the original parties and can in some circumstances bind third parties.<sup>103</sup> Under the fully operative provisions of the LRA 2002, this will not be the case. The attempted creation/transfer of a property right without using the electronic formalities will be without effect. It will not create a legal right (even

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<sup>100</sup>. Hence, for a while, failure to register an electronic deed will render the interest purely equitable, but see immediately below.

<sup>101</sup>. Technically, this is an electronic instrument having the effect of a deed, rather than actually being a deed: see section 91 LRA 2002 and the Draft Order inserting section 144A into LRA 1925.

<sup>102</sup>. E.g. *Walsh v Lonsdale*.

<sup>103</sup>. E.g. a “legal” lease over 21 years that is not registered with its own title, exists only in equity. As an equitable lease it binds original landlord and tenant and may be protected through the actual occupation provisions of s.70(1)(g) LRA 1925.

if a paper deed is used) and it will not create an equitable right. Failure to use the formalities required by s. 93 renders the transaction without legal effect and there is no fall back position. Consequently, there is little relevance in the distinction between legal and equitable rights. Instead, such rights either exist – having been created electronically – or they do not.

Of course, if e-conveyancing is to become both a reality and the norm, there is little choice but to adopt such a robust attitude. There can be no half-way house.<sup>104</sup> No doubt, however, there will be many occasions after the entry into force of section 93 LRA 2002 where private individuals use a paper deed or a written contract fully believing that they are creating something binding between themselves and perhaps for the future. It may even be that property professionals are slow to appreciate this dramatic change. Furthermore, the position is not made any easier by the fact that access to the electronic system – and hence the ability to create property rights – will be restricted to those with Network Access Agreements. Thus, not only are private individuals denied a simple method of creating or transferring rights in their own property (they cannot use paper), they cannot even use the electronic method without either engaging a property professional or going direct to the Land Registry. In such a climate, it is likely that a way will be found to give limited affect to the actions of parties genuinely attempting to create property rights, albeit that they failed miserably. The present author has argued elsewhere that proprietary estoppel provides the perfect vehicle for this, being the traditional antidote to lack of formality in dealings with land.<sup>105</sup> Without rehearsing those arguments in full, it seems likely that proprietary estoppel will be used both to cure defects in the creation of rights where the relevant electronic formalities have not been observed and, more importantly, to ensure that equitable versions of rights do exist when the dictates of section 93 are not observed. Thus, written agreements (be they in the form of a “contract”

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<sup>104</sup>. An express provision specifying that non-electronically registered deeds/contracts created purely equitable interests – perhaps the obvious half-way house - would undermine significantly the goal of a comprehensive register. Whether a plethora of equitable rights will arise by other means is discussed immediately below.

<sup>105</sup>. *Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability*, in *Modern Studies in Property Law Vol 2*, E. Cooke ed. Hart Publishing, (2003).

or a “deed”) may well be ineffective under s.93 LRA 2002, but may be re-born under the rubric of proprietary estoppel. Perhaps, indeed, this is foreseen by the legislation itself. As we know, s. 116 LRA 2002 now makes it clear that rights created by estoppel are inherently proprietary, even before they are made concrete by order of the court. Consequently, these inchoate but proprietary equities can bind purchasers of land through Schedules 1 and 3, almost certainly under the actual occupation provisions. This has already been accepted in relation to s. 70(1)(g) LRA 1925 – see *Lloyd v Dugdale*<sup>106</sup> – and looks set fair to replicate itself under LRA 2002.

### ***Concluding remarks***

There is a great deal more to the Land Registration Act 2002 than considered in this paper. The provisions on alteration of the register (formerly rectification), the entry of notices and restrictions (formerly minor interests), the powers of registered proprietors, issues of priority, charges and matters relating to the Crown occupy large portions of the Act. As with the provisions analysed above, they are fully argued in Law Commission Reports No. 254 and 271 and, at least to this author appear to be well thought out and overwhelmingly sensible. As ever, they are bent towards the goal of an effective and complete register that can support an advanced system of e-conveyancing.

It would, however, be surprising if such a mammoth undertaking as the LRA 2002 did not generate critical comment and the argument above has attempted to highlight areas of current or possible future concern, particularly with regard to the Act’s reforms of substantive principles of land law. The history of the 1925 legislation teaches us that a system so overly structured to support the free and uncomplicated alienability of land can be tempered – sometimes in the teeth of clear statutory words – in favour of occupiers of land and other third parties who appear to “deserve” protection whatever the statute might say. There is no doubt in the mind of the present author that the same will happen again with the LRA 2002. Whether that will occur in respect of the provisions discussed above is an open question. However, given that so much of the Act is designed to support e-conveyancing, but given also that the substantive changes to property law

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<sup>106</sup>. (2001) 48 EG 129 (CS).



necessary to support it will (indeed must) occur before that system becomes a reality, there will be a period of time during which the substantive law has changed but the system it is designed to support is not in place. That may well be the time of most risk, or most opportunity, depending on one's point of view. How the substantive reforming provisions of the LRA 2002 will be interpreted without the protective cloak of e-conveyancing is one of the most intriguing questions facing land registration in the twenty-first century. Will they be interpreted and applied in support of e-conveyancing or will they by design or accident be interpreted in a way that reduces its effect?

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